

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4 EDWARD THOMAS,

Case No.: C 13-4367 CW (PR)

5 Plaintiff,

ORDER DISMISSING CERTAIN CLAIMS  
WITH LEAVE TO AMEND AND DENYING  
MOTION TO APPOINT COUNSEL

6 v.

7 R.T.C. GROUNDS, et al.,

Doc. no. 2

8 Defendants.  
\_\_\_\_\_

9  
10 INTRODUCTION

11 Plaintiff Edward Thomas, a state prisoner incarcerated at the  
12 California State Prison at Corcoran, has filed a pro se civil  
13 rights action pursuant to 42 U.S.C. § 1983, alleging the violation  
14 of his constitutional rights by prison officials at Salinas Valley  
15 State Prison (SVSP), where he was formerly incarcerated. His  
16 motion for leave to proceed in forma pauperis is granted in a  
separate order.

17 DISCUSSION

18 I. Standard of Review

19 A federal court must conduct a preliminary screening in any  
20 case in which a prisoner seeks redress from a governmental entity  
21 or officer or employee of a governmental entity. 28 U.S.C.  
22 § 1915A(a). In its review, the court must identify any cognizable  
23 claims and dismiss any claims that are frivolous, malicious, fail  
24 to state a claim upon which relief may be granted or seek monetary  
relief from a defendant who is immune from such relief. Id.  
25 § 1915A(b)(1), (2). Pro se pleadings must be liberally construed.  
26 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
27 1988).  
28

1       To state a claim under 42 U.S.C. § 1983, a plaintiff must  
2 allege two essential elements: (1) that a right secured by the  
3 Constitution or laws of the United States was violated, and  
4 (2) that the alleged violation was committed by a person acting  
5 under the color of state law. West v. Atkins, 487 U.S. 42, 48  
6 (1988).

7       Liability may be imposed on an individual defendant under 42  
8 U.S.C. § 1983 if the plaintiff can show that the defendant's  
9 actions both actually and proximately caused the deprivation of a  
10 federally protected right. Lemire v. California Dept. Corrections  
11 & Rehabilitation, 726 F.3d 1062, 1074 (9th Cir. 2013); Leer v.  
12 Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City of  
13 Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives  
14 another of a constitutional right within the meaning of § 1983 if  
15 he does an affirmative act, participates in another's affirmative  
16 act or omits to perform an act which he is legally required to do,  
17 that causes the deprivation of which the plaintiff complains.  
18 Leer, 844 F.2d at 633. Under no circumstances is there respondeat  
19 superior liability under § 1983. Lemire, 726 F.3d at 1074. Or,  
20 in layman's terms, under no circumstances is there liability under  
21 § 1983 solely because one is responsible for the actions or  
22 omissions of another. Taylor v. List, 880 F.2d 1040, 1045 (9th  
23 Cir. 1989); Ybarra v. Reno Thunderbird Mobile Home Village, 723  
24 F.2d 675, 680-81 (9th Cir. 1984).

25       A supervisor may be liable under § 1983 upon a showing of  
26 personal involvement in the constitutional deprivation or a  
27 sufficient causal connection between the supervisor's wrongful  
28 conduct and the constitutional violation. Redman v. County of San

1       Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc) (citation  
2 omitted). A supervisor therefore generally "is only liable for  
3 constitutional violations of his subordinates if the supervisor  
4 participated in or directed the violations, or knew of the  
5 violations and failed to act to prevent them." Taylor, 880 F.2d  
6 at 1045. This includes allegations that a supervisor implemented  
7 "a policy so deficient that the policy itself is a repudiation of  
8 constitutional rights and is the moving force of the  
9 constitutional violation." Redman, 942 F.2d at 1446; Jeffers v.  
10 Gomez, 267 F.3d 895, 917 (9th Cir. 2001).

11       II. Plaintiff's Claims

12           A. Due Process Claims for Denial of Administrative Appeals

13       Plaintiff alleges that eighteen individuals, who are  
14 employees at SVSP, where Plaintiff was formerly incarcerated,  
15 violated his constitutional rights. Much of Plaintiff's forty-one  
16 page complaint consists of allegations pertaining to his  
17 administrative grievances and their denials and many of the  
18 individuals Plaintiff names as defendants are alleged to have been  
19 involved in the denial of these grievances.

20       The allegations that Defendants were involved in reviewing  
21 and denying Plaintiff's inmate appeals cannot serve as the sole  
22 basis for liability under § 1983. See Ramirez v. Galaza, 334 F.3d  
23 850, 860 (9th Cir. 2003) (denying claim of loss of a liberty  
24 interest in processing of inmate appeal because inmates lack a  
25 separate constitutional entitlement to a specific prison grievance  
26 procedure); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988) (a  
27 state's unpublished policy statements establishing a grievance  
28 procedure did not create a constitutionally protected liberty

1 interest). However, if the individuals who deny a prisoner's  
2 appeals had the authority and opportunity to prevent an ongoing  
3 constitutional violation, he may be able to establish liability by  
4 alleging that they knew about an existing or impending violation  
5 and failed to prevent it. Taylor, 880 F.2d at 1045 (supervisory  
6 official liable under § 1983 if he knew of a violation and failed  
7 to act to prevent it); see also Watkins v. City of Oakland, 145  
8 F.3d 1087, 1093 (9th Cir. 1998) (supervisor who signed internal  
9 affairs report dismissing complaint against officer despite  
10 evidence of officer's use of excessive force may be liable for  
11 damages).

12 Plaintiff does not allege that the individuals who denied his  
13 appeals knew of an ongoing or impending violation and failed to  
14 prevent it. Therefore, Plaintiff's claims based on the denial of  
15 his administrative grievances are dismissed. He is granted leave  
16 to amend to allege, if he truthfully can, that Defendants knew of  
17 an ongoing violation and failed to prevent it.

18       B. Procedural Due Process Claims Regarding Hearings

19 Plaintiff alleges that at some of his administrative hearings  
20 he was denied his right to present evidence and witnesses. The  
21 process due in prison disciplinary proceedings includes written  
22 notice of the charges, time to prepare for the hearing, a written  
23 statement of decision, allowance of witnesses and documentary  
24 evidence when not unduly hazardous to institutional safety or  
25 correctional goals, and aid to the accused where the inmate is  
26 illiterate or the issues are complex. Wolff v. McDonnell, 418  
27 U.S. 539, 564-67 (1974). The fact that a prisoner may have been  
28 innocent of disciplinary charges brought against him does not give

1 rise to a constitutional claim. Ricker v. Leapley, 25 F.3d 1406,  
2 1410 (8th Cir. 1994). The Constitution demands due process in  
3 disciplinary procedures, not error-free decision-making. Id.

4 Plaintiff's allegations that he could not present evidence or  
5 witnesses at some of his disciplinary hearings appear to be  
6 cognizable. However, Plaintiff does not indicate which Defendant  
7 or Defendants were responsible for these violations. As stated  
8 above, in order to impose liability on an individual under § 1983,  
9 a plaintiff must allege that the individual's conduct caused the  
10 constitutional violation. Plaintiff is granted leave to amend his  
11 complaint to remedy this deficiency.

12       C. Dangerous Conditions Claim

13 Plaintiff alleges that he was forced to accept a cell-mate  
14 from a rival gang which put him in imminent danger. The Eighth  
15 Amendment requires that prison officials take reasonable measures  
16 to protect prisoners' safety, including measures to protect  
17 prisoners from violence at the hands of other prisoners. Farmer  
18 v. Brennan, 511 U.S. 825, 832-33 (1994).

19 Therefore, Plaintiff's allegation states a cognizable claim.  
20 However, Plaintiff does not indicate which Defendants caused this  
21 violation; he is granted leave to amend to remedy this deficiency.

22       D. Excessive Force Claim

23 Plaintiff alleges that, while he was escorted to the mental  
24 health building, he was struck in his right ear by Defendant G.  
25 Gasgonia, who then proceeded to rip Plaintiff's glasses off his  
26 face. Plaintiff was then struck repeatedly by Defendants S.  
27 Martinez, B. Hopark and two unidentified officers.

28

1       In order to state a claim for the use of excessive force in  
2 violation of the Eighth Amendment, a plaintiff must allege facts  
3 that, if proven, would establish that prison officials applied  
4 force "maliciously and sadistically to cause harm," rather than in  
5 a good-faith effort to maintain or restore discipline. Hudson v.  
6 McMillian, 503 U.S. 1, 6-7 (1992).

7           Liberally construed, Plaintiff's allegations state an  
8 excessive force claim against Defendants Gasgonia, Martinez and  
9 Hopark.

10           E. Retaliation Claims

11           Plaintiff alleges that, in retaliation for filing staff  
12 misconduct complaints, Defendant J. Lopez stole his personal  
13 property and Defendants B. Hedrick and T. Berlinger placed him in  
14 administrative segregation.

15           Retaliation by a state actor for the exercise of a  
16 constitutional right is actionable under 42 U.S.C. § 1983, even if  
17 the act, when taken for different reasons, would have been proper.  
18 Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84  
19 (1977). The plaintiff must show that the type of activity he was  
20 engaged in was protected by the First Amendment and that the  
21 protected conduct was a substantial or motivating factor for the  
22 alleged retaliatory acts. Id. at 287. Prisoners may not be  
23 retaliated against for exercising their right of access to the  
24 courts. Schroeder v. McDonald, 55 F.3d 454, 461 (9th Cir. 1995).  
25 The right of access to the courts extends to established prison  
26 grievance procedures. Bradley v. Hall, 64 F.3d 1276, 1279 (9th  
27 Cir. 1995) overruled on other grounds by Shaw v. Murphy, 532 U.S.  
28 223, 230 n.2 (2001). Thus, a prisoner may not be retaliated

1 against for using such procedures. Rhodes v. Robinson, 408 F.3d  
2 559, 567 (9th Cir. 2005).

3 Liberally construed, Plaintiff's allegations state a  
4 retaliation claim against Defendants Lopez, Hedrick and Berlinger.

5 F. Claims Based on Gang Status

6 Plaintiff asserts that each Defendant violated his rights to  
7 equal protection and to be free from cruel and unusual punishment  
8 because they have refused to remove all gang status references  
9 from his central files, to classify him as a non-affiliate and to  
10 cell him with a non-affiliate.

11 "The Equal Protection Clause of the Fourteenth Amendment  
12 commands that no State shall 'deny to any person within its  
13 jurisdiction the equal protection of the laws,' which is  
14 essentially a direction that all persons similarly situated should  
15 be treated alike." City of Cleburne v. Cleburne Living Center,  
16 473 U.S. 432, 439 (1985). A plaintiff alleging denial of equal  
17 protection under § 1983 must prove purposeful discrimination by  
18 demonstrating that he "receiv[ed] different treatment from that  
19 received by others similarly situated," and that the treatment  
20 complained of was under color of state law. Van Pool v. City and  
21 County of San Francisco, 752 F. Supp. 915, 927 (N.D. Cal. 1990)  
22 (citations omitted), aff'd sub nom. O'Shea v. City and County of  
23 San Francisco, 966 F.2d 503 (9th Cir. 1992). A prisoner raising  
24 an equal protection challenge to his treatment compared to the  
25 treatment of other inmates must allege that his treatment is  
26 invidiously dissimilar to that received by other inmates. See  
27 More v. Farrier, 984 F.2d 269, 271-72 (8th Cir.) (absent evidence  
28 of invidious discrimination, federal courts should defer to

1 judgment of prison officials); Timm v. Gunter, 917 F.2d 1093,  
2 1102-03 (8th Cir. 1990) (same).

3 Plaintiff's conclusory allegations against "each Defendant,"  
4 without alleging what each Defendant did to violate Plaintiff's  
5 equal protection or Eighth Amendment rights are insufficient to  
6 state a claim. Plaintiff is granted leave to amend to remedy this  
7 deficiency, if he truthfully can do so.

8 G. Request for Emergency Injunction

9 Plaintiff seeks an emergency injunction for a transfer from  
10 SVSP to either Corcoran State Prison or Lancaster State Prison and  
11 other relief because he is in imminent danger from officers at  
12 SVSP. However, Plaintiff indicates that his current address is  
13 Corcoran State Prison. Therefore, it appears that Defendants have  
14 complied with Plaintiff's request for a transfer and, thus,  
15 imminent danger from SVSP employees no longer exists.  
16 Accordingly, the Court denies as moot the request for an emergency  
17 injunction for a transfer and other relief based on imminent  
18 danger.

19 III. Motion for Appointment of Counsel

20 Plaintiff moves for the appointment of counsel based on the  
21 complexity of the issues and the fact that Plaintiff is  
22 "illiterate." The decision to request counsel to represent an  
23 indigent litigant under § 1915 is within "the sound discretion of  
24 the trial court and is granted only in exceptional circumstances."  
25 Franklin v. Murphy, 745 F.2d 1221, 1236 (9th Cir. 1984). A  
26 finding of the "exceptional circumstances" of the plaintiff  
27 seeking assistance requires an evaluation of the likelihood of the  
28 plaintiff's success on the merits and an evaluation of the

1 plaintiff's ability to articulate his claims pro se in light of  
2 the complexity of the legal issues involved. Agyeman v.  
3 Corrections Corp. of America, 390 F.3d 1101, 1103 (9th Cir. 2004).  
4 Neither the need for discovery, nor the fact that the pro se  
5 litigant would be better served with the assistance of counsel,  
6 necessarily qualify the issues involved as complex. Rand v.  
7 Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997).

8 Plaintiff is capable of presenting his claims effectively,  
9 and the issues, at least at this stage, are not complex. If the  
10 circumstances of this case materially change, this decision will  
11 be reconsidered by the Court on its own motion. Therefore, the  
12 motion to appoint counsel is DENIED.

13 CONCLUSION

14 For the foregoing reasons, the Court orders as follows:

15 1. The motion to appoint counsel is DENIED. Doc. no. 2.

16 2. Plaintiff states a cognizable claim for excessive force  
17 against Defendants Gasgonia, Martinez and Hopark.

18 3. Plaintiff states a cognizable retaliation claim against  
19 Defendants Lopez, Hedrick and Berlinger.

20 The cognizable claims will be served after Plaintiff submits  
21 an amended complaint, or the time for him to do so has passed.

22 4. Plaintiff's request for emergency relief based on  
23 imminent danger is denied as moot.

24 5. The following claims are not cognizable: (1) due process  
25 based on the denial of administrative grievances; (2) due process  
26 based on unconstitutional procedures used at administrative  
27 hearings; (3) dangerous conditions based on being celled with  
28 rival gang member; and (4) equal protection and dangerous

1 conditions based on failure to delete gang status references from  
2 his central file.

3       6. If Plaintiff can cure the pleading deficiencies described  
4 above, he shall file an AMENDED COMPLAINT within twenty-eight days  
5 from the date this order is filed. The amended complaint must  
6 include the caption and civil case number used in this order  
7 (C 13-4367 CW (PR)) and the words AMENDED COMPLAINT on the first  
8 page.

9       Federal Rule of Civil Procedure 8(a)(2) requires only "a  
10 short and plain statement of the claim showing that the pleader is  
11 entitled to relief." "Specific facts are not necessary; the  
12 statement need only give the defendant fair notice of what the  
13 . . . claim is and the grounds upon which it rests." Erickson v.  
14 Pardus, 551 U.S. 89, 93 (2007) (citations omitted). Although a  
15 complaint "does not need detailed factual allegations," . . . they  
16 must be sufficient "to raise a right to relief above the  
17 speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544,  
18 555 (2007) (citations omitted).

19       Therefore, forty-one densely written pages are not necessary  
20 for Plaintiff to provide sufficient allegations to state  
21 cognizable claims against Defendants. However, the amended  
22 complaint must indicate which specific, named Defendant(s) was  
23 involved in the deprivation of Plaintiff's constitutional rights,  
24 what each Defendant did, what effect this had on Plaintiff and  
25 what right was violated. The best way to accomplish this would be  
26 to divide the amended complaint into sections, one section for  
27 each claim. Under each claim Plaintiff should indicate which  
28 Defendant or Defendants he is suing for that violation and the  
conduct of each Defendant that violated that particular

1 constitutional right. Plaintiff need not include the details of  
2 each administrative grievance he filed and its result, unless it  
3 is relevant to a specific claim.

4 Plaintiff may not incorporate material from the prior  
5 complaint by reference.

6 Failure to file an amended complaint within twenty-eight days  
7 and in accordance with this Order will result in a finding that  
8 further leave to amend would be futile, and the four non-  
9 cognizable claims will be dismissed. In that case, the two  
10 cognizable claims will be served and will go forward.

11 7. It is Plaintiff's responsibility to prosecute this case.  
12 Plaintiff must keep the Court informed of any change of address by  
13 filing a separate paper with the Clerk headed "Notice of Change of  
14 Address," and must comply with the Court's orders in a timely  
15 fashion. Failure to do so may result in the dismissal of this  
16 action for failure to prosecute pursuant to Federal Rule of Civil  
17 Procedure 41(b).

18 IT IS SO ORDERED.

19 Dated: 12/6/2013



20 CLAUDIA WILKEN  
21 UNITED STATES DISTRICT JUDGE

22  
23  
24  
25  
26  
27  
28